AUG 29 2007

No. 06-1361

In the Supreme Court of the United States

MARCEL SFARCIOC, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly dismissed the petition for review of an order of the Board of Immigration Appeals because the petition was not timely filed.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. Exh. 4) is unreported. The order of the Board of Immigration Appeals (App., *infra*, 27a-31a) and the decision of the immigration judge (App., *infra*, 1a-23a) are unreported.*

JURISDICTION

The judgment of the court of appeals was entered on November 6, 2006. A petition for rehearing was denied on December 12, 2006 (Pet. App. Exh. 5). The petition for a writ of certiorari was filed on March 12, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

* Because the July 26, 2006 Board of Immigration Appeals decision included in petitioner's appendix is incomplete, respondent cites to the reissued decision included in an appendix to this brief.

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, a petition for judicial review "must be filed not later than 30 days after the date of the final order of removal." 8 U.S.C. 1252(b)(1). Federal Rule of Appellate Procedure (FRAP) 15(a)(1) states that "[r]eview of an agency order is commenced by filing [the petition], * * * with the clerk of a court of appeals authorized to review the agency order." FRAP 25(a)(2)(A) provides that "filing is not timely unless the clerk receives the papers within the time fixed for filing." FRAP 26(b)(2) prohibits the courts of appeals from extending the time for filing, *inter alia*, a petition to review an order of an administrative agency or board.

2. Petitioner is a native and citizen of Romania. App., *infra*, 2a. He entered as a refugee in 1987 and later adjusted his status to that of lawful permanent resident. *Id.* at 3a. Between 1996 and 2005, petitioner was convicted of at least five crimes including receiving and concealing stolen property in 1996 and possession of a motor vehicle with intent to pass false title in 2005. *Id.* at 3a-4a. Placed in removal proceedings, he was found removable under 8 U.S.C. 1227(a)(2)(A)(ii) of the INA as an alien convicted of two or more crimes of moral turpitude not arising out of a single scheme of criminal misconduct. App., *infra*, 1a. Petitioner sought cancellation of removal under Section 240A(a) of the INA, 8 U.S.C. 1229b (2000 & Supp. V 2005). App., *infra*, 8a. The immigration judge (IJ) denied cancellation in the exercise of her discretion, recognizing petitioner's "considerable equities" (*id.* at 17a) but finding that petitioner had "significant adverse factors" (*id.* at 18a), including a "significant criminal record" (*id.* at 19a) about which

petitioner was "extremely dismissive" (*ibid.*) and "less than candid with the [c]ourt" (*id.* at 20a); a "history of drug use" (*id.* at 22a) about which petitioner may have "presented false testimony" (*ibid.*); and a "fail[ure] to demonstrate rehabilitation" (*ibid.*).

3. On July 26, 2006, the Board of Immigration Appeals (BIA) adopted and affirmed the IJ's decision. App., *infra*, at 27a-31a. It reviewed in detail petitioner's equities, *id.* at 28a, but agreed that they were "outweigh-[ed]" by various adverse factors, including his long criminal history and his "varying and rather self-serving explanations for his convictions," *id.* at 29a-30a.

4. In petitioner's case, the 30-day period for receipt of a petition for review expired on August 25, 2006, but his petition was not received by the court of appeals until August 28, 2006. Pet. App. Exh. 3, at 1-2. Petitioner submitted evidence indicating that he had mailed his petition for review on August 23, 2006, with guaranteed overnight delivery, such that it would have been timely filed but for misdelivery causing it to arrive at the court several days late. *Id.* Exhs. 1, 2, at 2.

5. The court of appeals held that the FRAP did not allow a court of appeals to extend the time for filing a petition for review of an administrative decision and that "the time limits are strictly enforced." Pet. App. Exh. 4, at 3 (citing, *inter alia*, *Stone* v. *INS*, 514 U.S. 386, 405 (1995)). The court accordingly dismissed the petition for review. *Ibid.*

6. The government and petitioner subsequently filed a joint motion with the BIA to reissue its July 26, 2006 decision to enable petitioner to file a new petition for review in the court of appeals. App., *infra*, 25a-31a. On June 18, 2007, the BIA granted the joint motion, vacated the July 26, 2006 order that was the subject of the peti-

tion for review below, and issued a new order incorporating by reference the text of the vacated order. *Ibid.*

7. The time for filing a petition for review of the BIA's new order in the court of appeals expired on July 18, 2007, without a petition for review having been filed.

ARGUMENT

Petitioner argues (Pet. 9-12) that the court of appeals should have excused his late filing because he relied on guaranteed overnight delivery. That claim lacks merit. The court of appeals correctly dismissed the petition for review for lack of jurisdiction because it was not timely filed. That decision does not conflict with any decision of this Court or any other court of appeals. Moreover, this petition for a writ of certiorari has become moot since it was filed, because the underlying BIA order has been vacated and petitioner was given the relief he sought through this petition—another opportunity for the court of appeals to consider his petition for review on the merits (Pet. 12)—but did not file a petition for review. Finally, the federal courts in any event lack jurisdiction to review the underlying issue petitioner raises, a challenge to the denial of cancellation in the exercise of agency discretion. This Court's review thus is not warranted.

1. To invoke the jurisdiction of a court of appeals, an alien must file a petition for review "not later than 30 days" after the final order of the BIA, 8 U.S.C. 1252(b)(1). This Court has held that a court of appeals "lack[s] jurisdiction to review" a BIA order if the petition for review is not filed within the statutory time limit. *Stone* v. *INS*, 514 U.S. 386, 406 (1995); see *Bowles* v. *Russell*, 127 S. Ct. 2360, 2364 (2007) (reaffirming the "longstanding treatment of statutory time limits for tak-

ing an appeal as jurisdictional"). Petitioner does not dispute that his petition for review was not filed within the time specified by 8 U.S.C. 1252(b)(1). Accordingly, the court of appeals correctly determined that it lacked jurisdiction.

As petitioner notes (Pet. 9-11), the Second Circuit has held that lateness in filing notices of appeal to the BIA should be excused where the lateness arose from delay of guaranteed next-day delivery. *Zhong Guang Sun* v. *United States Dep't of Justice*, 421 F.3d 105 (2005). Other circuits, including the Sixth Circuit, have observed or implied that errant overnight delivery could constitute extraordinary circumstances justifying relief from a late filing with the BIA. See, *e.g.*, *Oh* v. *Gonzalez*, 406 F.3d 611 (9th Cir. 2005); *Anssari-Gharachedaghy* v. *INS*, 246 F.3d 512, 514 (6th Cir. 2000). But petitioner has not cited any court of appeals precedent excusing similar lateness in filing a petition for review with a court of appeals. In dismissing petitioner's petition for review, the court of appeals relied on FRAP 26(b)(2), which governs petitions for review but not notices of appeal to the BIA, and the precedent of this Court construing FRAP. Pet. App. Exh. 4, at 3 (citing *Stone*). Thus, petitioner has not demonstrated that the court's decision was erroneous or in conflict with any other decision.

2. Review by this Court would be unwarranted even if the decision below were incorrect. In view of the circumstances of petitioner's case, the government filed a joint motion with petitioner (through counsel) requesting the BIA to issue a new final order of removal in order to afford petitioner a fresh opportunity to file a timely petition for review. App., *infra*, 25a-26a. The BIA granted that motion, vacated the July 26, 2006 or-

der that is the subject of this petition for a writ of certiorari, and issued a new removal order dated June 18, 2007. The BIA's vacatur of the July 26 order rendered moot the petition for review of that order, and therefore rendered moot this petition for a writ of certiorari, which seeks review of the court of appeals' dismissal of that petition for review.

Moreover, the BIA's action afforded petitioner all the relief he sought in this petition for a writ of certiorari. Petitioner, claiming that he unfairly lost the opportunity to present his case to the court of appeals, asked this Court only to "remand his case to the Sixth Circuit Court of Appeals to be heard on the merits." Pet. 12. The BIA's reissuance of its decision in petitioner's case provided him with another opportunity to obtain judicial review in the Sixth Circuit by filing a petition for review by July 18, 2007. But no petition for review has been filed with the court of appeals. The failure to pursue that opportunity is chargeable solely to petitioner. Mootness aside, petitioner's failure to file a petition for review when afforded a fresh opportunity to do so confirms that there are no grounds for this Court's intervention.

3. Even if there were some reason for this Court to consider the issue presented by petitioner, this case would not be a suitable vehicle for doing so for the additional reason that petitioner could not ultimately prevail on the merits of his case. Petitioner raised only one issue before the BIA, the IJ's denial of cancellation of removal in the exercise of discretion. App., *infra*, 27a-31a. Section 242(a)(2)(B)(i) of the INA, 8 U.S.C. 1252(a)(2)(B)(i), provides that "no court shall have jurisdiction to review * * * any judgment regarding the granting of relief under section * * * 1229b of this title [the cancellation provision]." The exception to that

jurisdictional preclusion for constitutional claims and questions of law, introduced into the statute by the REAL ID Act of 2005 (REAL ID Act), Pub. L. No. 109-13, Div. B, § 106(a), 119 Stat. 310, and set forth at Section 242(a)(2)(D) of the INA, 8 U.S.C. 1252(a)(2)(D) (Supp. V 2005), would not apply to petitioner's challenge to the BIA's discretionary weighing of the equities. See, *e.g.*, *Wilmore* v. *Gonzales*, 455 F.3d 524, 528-529 (5th Cir. 2006) (where no constitutional claim or issue of law is raised, the REAL ID Act does not eliminate the jurisdictional bar to review of discretionary decisions); accord *Martinez* v. *United States Att'y Gen.*, 446 F.3d 1219, 1222 (11th Cir. 2006); *Bugayong* v. *INS*, 442 F.3d 67, 71 (2d Cir. 2006); *Vasile* v. *Gonzales*, 417 F.3d 766, 768 (7th Cir. 2005). Petitioner would thus be unable in any event to secure reversal of the BIA's decision in the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

DONALD E. KEENER
ALISON R. DRUCKER
Attorneys

AUGUST 2007

APPENDIX A

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Detroit, Michigan

File No.: A 27 772 726

IN THE MATTER OF MARCEL SFARCIOC, RESPONDENT

May 3, 2006

IN REMOVAL PROCEEDINGS

CHARGES:

Section 237(a)(2)(A)(ii) of the Immigration and Nationality Act, as amended—after admission convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct; and

Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, as amended—after admission convicted of an aggravated felony as defined in Section 101(a)(43)(U), to wit: an attempt to commit an offense described in Section 101(a)(43)(G), to wit: a theft offense including receipt of stolen property or burglar offense for which the term of imprisonment imposed is at least one year; and

Section 237(a)(2)(B) of the Immigration and Nationality Act, as amended—after admission

convicted of a violation of a, or a conspiracy or attempt to violate any law or, regulation of any State, the United States, or a foreign country relating to a controlled substance as defined in Section 102 of the Controlled Substances Act, No. 21 U.S.C. 802 other than a single offense involving possession for one's own use of 30 grams or less of marijuana.

APPLICATION:

Section 240A(a) of the Immigration and Nationality Act, as amended—cancellation of removal for a permanent resident.

ON BEHALF OF RESPONDENT:

Roger Rathi, Attorney and Daniel Marcus,
Attorneys at Law
24655 Southfield Road, Suite 210
Southfield, MI 48075

ON BEHALF OF DHS:

Rosario Shoudy
Assistant Chief Counsel
315 Mount Elliott
Detroit, MI 48207

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a married male who is a native and citizen of Romania. The Department of Homeland Security (DHS) initiated proceedings against the respondent through the issuance of a Notice to Appear under Section 240 of the Immigration and Nationality Act

(hereinafter "the Act"). These proceedings were commenced with this Court by the filing of the Notice to Appear with the Court. *See* Exhibit No. 1; 8 C.F.R. 1003.14(a).

On March 14, 2006, the DHS amended the Notice to Appear by the issuance of an additional charge of inadmissibility. *See* Exhibit 1-A. The DHS then amended further on May 2, 2006 by the filing of an additional charge and factual allegations against the respondent. *See* Exhibit 1-B.

At a hearing before the Court, the respondent, through Counsel admitted as alleged on the Notice to Appear that he is not a citizen or national of the United States, but rather a native of Romania and citizen of Romania. The respondent admitted that he came to the United States at New York on or about December 27, 1987 as a refugee, and his status was then adjusted to that of lawful permanent resident relating back to the effective date of entry pursuant to Section 209(a) of the Act.

The respondent admitted that on May 23, 1996, he was convicted in the Sixth Circuit Court in Pontiac. Michigan of the offense of receiving and concealing stolen property in an amount over $100 pursuant to Section 750.536 of the Michigan Compiled Laws (MCL). *See* Exhibit No. 2. The respondent further admitted that on October 9, 1997 he was convicted in the recorded Court for the City of Detroit of the offense of receiving and concealing stolen property in an amount over $100, again in violation of MCL 750.535(A). *See* Exhibit No. 3. The respondent admitted that he was convicted on August 9, 2005 of two counts of the offense of possession of a motor vehicle with intent to pass false title in vio-

lation of MCL 257.254 in the Circuit Court in Pontiac, Michigan. *See* Exhibit No. 4.

The respondent admitted that on May 5, 1997, he was convicted in the Circuit Court in Oakland County, Michigan for the offense of the attempted unlawful driving away of an automobile in violation of MCL 750.43(A). The respondent, however, denied factual allegation 11 which states in pertinent parts that the respondent on June 23, 2005 was convicted of a violation of probation for that offense and sentenced to a term of imprisonment of 365 days. The Government submitted, what has been marked as Exhibit No. 6 in this proceeding, a record of conviction which does establish a sentencing on the date set forth for the offense. However, Counsel for the respondent has submitted a subsequent ruling by the Court on March 2, 2006 where the Court resentenced through order granting reduction in sentence nunc pro tunc the respondent to a term of 273 days on the violation of probation with respect to the attempted unlawful driving away of a motor vehicle.

The respondent has denied a conviction on July 14, 1993 in the Seventeenth Judicial Circuit Court in Broward County in the State of Florida for the offense of attempted possession of cocaine in violation of Florida statutes 893.03 and 777.03. The Government in support of that has submitted what has been marked as Exhibit No. 10, a certified record of conviction from Broward County.

Respondent has conceded removability under provisions in Section 237(a)(2) of the Act. The charge of removability will be sustained by both the evidence of record and the respondent's admission, by clear and convincing evidence. Section 240(c)(3) of the Act.

The charges of removability under Section 237(a)(2)(A)(iii) of the Act required the Government to establish that the respondent has been convicted of an aggravated felony attempt under Section 101(a)(43)(G), a theft offense for which the respondent has been sentenced to a term of imprisonment of at least one year. The respondent's conviction for the unlawful driving away of a motor vehicle has been found to be a theft offense by the Board of Immigration Appeals in a precedent decision. *See* e.g., *Matter of V-Z-F-*, 22 I&N Dec. 1338 (BIA 2000).

The Court notes therefore that the respondent has been convicted of a theft offense.

The issue in this case is whether or not the sentence for the offense was to a sentence of more than one year or a year or more. In this case the initial sentence imposed by the Court clearly was for 365 days which is one year. However, the Court on motion filed by Counsel (*see* Exhibit No. 9) did grant a motion for resentencing indicating that in the Court's order that it was granted, and the respondent was resentenced nunc pro tunc to a term of 273 days.

The Court notes that the respondent has filed, although it is not a matter of record, a copy of what was submitted to the sentencing Court, and notes that while the deportation consequences played a part in the order of the Court, it was not the sole basis for resentencing. The Court further notes that the Board has ruled both in *Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005) and *Matter of Song*, 23 I&N Dec. 173 (BIA 2001) that the Court is bound by the statement of the Trial Court with respect to resentencing in this matter. Therefore, the Court finds that the charges under Section 237(a)(2)(A)(iii) of the Act are not sustained.

The opening of today's files there was an additional charge under Section 237(a)(2)(B)(i) of the Act. The Court notes first of all that the charge is based upon a claim of conviction on July 14, 1993. The Government has presented what is a certified record of conviction in the name of Ioan Sfarcioc. The conviction record consists of the cover document certifying it signed by the clerk of the Court, what appears to be a record of some sort by the Court containing the name of the respondent, his physical description, and a probable cause affidavit signed by the officer. Additionally, the record contains a judgment by the Court where the individual named was sentenced a term of probation and a fine and a copy of fingerprint records and a notice of Court status. *See* Exhibit No. 10. The Oakland County Prosecutor David Gorcyca filed notice of intent to seek sentence enhancement for a second offense in the case citing the Oakland County Circuit Case No. 97150607, however, naming Ioan Sfarcioc. While this is rather confusing, the case number belongs to the respondent, Marcel Sfarcioc, and I notice the sentence enhancement seeking such indicates Ioan Sfarcioc. The Government argues that the sentence enhancement by citing the case number and further on the information having written on it in pen a.k.a. Ioan, satisfies the showing that the conviction from the State of Florida relates to the respondent. The Court does not agree. First, the party in the conviction record is a different name, indeed, a name of the respondent's sibling born [*sic*] by one of the respondent's siblings. However, the respondent himself has admitted to the Court that he has used his brother's name in the unlawful driving away of a motor vehicle charge by using his brother's identity document at some point during the processing and ultimately clarifying it

with the Judge as to his real identity. So the respondent has admitted to the use of this name in the past, but that alone does not satisfy the requirement by clear and convincing evidence of establishing that this conviction relates to respondent. The conviction occurred in Florida. The respondent states that while he has been in Florida, he did not go to Florida until he was approximately 18 or 19 years old, going there for approximately a week and a half at a time on the Spring break excursions with friends. Respondent does acknowledge that he resided in 1992, the date of the offense, in Fullerton, California at the address on Loft Street. What does not appear to relate to the respondent is the physical description. First of all in 1992 the respondent would have been approximately 15 years of age. The age of the individual convicted in Florida is 21. The Court notes that a distinction between a 15 year old and a 21 year old is generally significant enough to preclude a child of 15 from passing as a 21 year old, particularly where as it is here involves a criminal proceeding, but that is not the only distinction. The next distinction is the color of his hair. The record, the probable cause affidavit, indicates that the person described was blonde. The respondent's hair is an extremely dark brown so as to appear to be black. The height of the individual listed is five foot seven. The Court has questioned Officer Jolan of the Calhoun County Sheriff's Department who was present as to the respondent's height at the time of today, and he appears to be five-nine or five-ten. The date of birth of the individual convicted on the probable cause affidavit is April 15, 1971. The respondent was born in January of 1977. The Government argues that the finding of the State Court is sufficient to find the respondent to the conviction. She presents no legal basis for this, and the

Court, in light of the respondent's denial and in light of the physical discrepancies contained in the certified record presented by the Government and in the absence of any other evidence linking the respondent to this, must find that the Government has not sustained its burden. The Court notes specifically that the respondent in this case was fingerprinted, and the Government has submitted the FBI printout on the respondent. Based upon those fingerprints, and while a 1992 juvenile conviction is present, it does not list a 1992 conviction in the State of Florida. The Court notes that the fingerprints are part of the record of conviction in this case and have not been examined or no expert witness has testified thereto. Therefore, the Court finds the charges under Section 237(a)(2)(B)(i) of the Act are not sustained.

Deportability has, however, been sustained as indicated under the provisions in Section 237(a)(2)(A)(ii) of the Act. The respondent has designated Romania as the country to which removal would be directed. The Court has questioned the respondent concerning what applications for relief would be pursued, and the respondent is seeking relief under Section 240A(a) of the Act.

FACTS

The evidence at hearing consisted of the respondent's application for cancellation of removal, a copy of a C receipt, his spouse's birth certificate, his child's birth certificate, a letter from Marcel Sfarcioc, the respondent, a letter from his spouse, from Marica Sfarcioc (his mother), Ioan Sfarcioc (father), Daniel Sfarcioc (brother), Rodica Timoficiec (sister), Gheorge Iocoban (pastor), Pavel Aileni (associate pastor), Gheorge Pusta

(treasurer and deacon of church), a marriage certificate for the respondent, a rental agreement with the respondent's sister, a letter from the respondent's brother showing employment, and documents reflecting U.S. citizenship and lawful permanent resident status of family members. The respondent has also submitted a copy of the order resentencing in case number 97150607-FH from the Circuit Court for Oakland County, and a copy of the new judgment and conviction. *See* Exhibit No. 9. The Government has submitted copies of the conviction record. *See* Exhibit 2-6, 10, a record of the results of a fingerprint examination. *See* Exhibit No. 7. At hearing the respondent presented two witnesses, himself and his United States citizen spouse. The respondent testified that he was ten years old at the time he entered in 1987. He stated that he is currently married to Angie Sfarcioc. They have been married for six years, and they have one child, Matthew, who was born January 15, 2001. The respondent has variously lived in California and Michigan at different times, as well as the State or [*sic*] Arizona.

Respondent was asked on direct examination concerning his arrest and testified that he did not recall any arrest in 1992. Herein he testified he did recall being arrested in 1995 for receiving and concealing over $100. The respondent described the offense bringing a van to a friend and indicating that there was an item in the van which was found to be a stolen item. The respondent testified that he did go to Court for that offense, and he was sentenced 90 days in the so-called "boot camp".

The respondent testified his next arrest occurred in 1997, again involving receiving and concealing over $100, stating that he believed he was approximately 18 years

old at the time. The respondent by the age which he has represented him to be would have been 20 years old at the time of being sentenced. He testified that he was sentenced to three months time served and given two years probation and paid a fine something in the amount of $3,000. The respondent was then asked if there were any other charges that had occurred in 1997 and he stated that he believed there was another charge. The respondent testified that he was charged with unlawful driving away of a motor vehicle. He described the event as being with three friends and one of the friends opened the door of a car and security guards then called the police taking all three in custody. The respondent testified he pled guilty because he was told he was only going to get two years probation. The respondent testified he did not complete the sentence, indicating that he was cited for a probation violation in May of 2005. He testified that he was stopped near his home for backing out, and apparently backing on the street by the authorities in violation of city codes in excess the length of a person could back up on such city streets. Respondent was charged with a miscellaneous public order crime in May of 2002. *See* Exhibit No. 7. The respondent testified at that time the Detroit police found out that there was a warrant for his arrest for the offense of intending to pass a false title to a motor vehicle, and he was transferred to Oakland County Sheriff's Department where he was arrested for that offense in May of 2005. The respondent testified that it apparently involved a vehicle which he allegedly purchased at an auction in Arizona. The respondent claims to have presented the vehicle for titling in Arizona and when coming to Michigan had a title issued. The respondent claims he sold the vehicle and attempted to transfer the title, the title having de-

fects under Michigan law.[1] The respondent claims he pled guilty because he was advised that he was only going to be given five months of probation.

The respondent testified that he did have other arrests involving drinking and driving in 1998.

The respondent testified that he had been employed as a truck driver earning some 80 to 150,000 dollars annually. He testified that he and his wife have been living in an apartment. He testifies that he has exhausted savings which the family had intended to purchase a home to support his wife since he has been in custody for more than one year.

The respondent testified he has 20 brothers and sisters in the United States all of whom are either citizens or permanent residents. He said that six of his siblings were born here and six others have naturalized as United States citizens leaving some eight siblings who are lawful permanent residents. The respondent testified that he attends church with his family. He is very close with his family. He testifies that since 2000 and his marriage to his wife he has turned his life around and he expressed remorse for the offenses.

On cross-examination, the respondent was questioned by Government Counsel as to whether or not he had used the name Dorin Sfarcioc. The respondent testified that that was his brother's name, and he did not recall using it initially. Later the respondent acknowledged that in fact he had presented documentation identification in his brother's name in an attempt to

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[1] The respondent has presented no evidence of valid ownership of the vehicle in Arizona or the facts or circumstances underlying the offense.

avoid culpability in 1997 when he was arrested for unlawfully driving away a motor vehicle. He testified that when he went before the Court he advised the Court of his true identity.

The respondent was then questioned as to whether or not he had been arrested on April 24, 1997 in the city of Troy, Michigan and charged with operating under the influence of drugs and driving while license was suspended and obstruction of an officer. The respondent testified that he did not recall being arrested, and he did not recall being arrested for drugs when initially questioned by Government Counsel. However, he did admit that he had gotten a fine for driving while a license was suspended, indicating that that had happened on at least two or three occasions. The respondent testified it occurred in Troy in 1994 or 1995 as well as in Sterling Heights in '97 or '98 when he was working for Liberty Tile. He testified that his license was suspended for unpaid tickets.

The respondent was then asked by Government Counsel if he had ever used drugs. The respondent acknowledged that he did use drugs when he was younger, testifying that he had used them when he was 17. He has used both drugs and alcohol, stating he smoked pot for approximately a year or a year and a half at the age of 17 and experienced an alcohol problem from the age of 16 to 20. The respondent then testified that he had one operating under the influence of alcohol ticket, as well as a second ticket for driving a vehicle while high. The respondent then acknowledged that that might have been in Troy.

The respondent was then asked if he had been arrested in the city of Tolleson, Arizona for failing to ap-

pear in the second degree. The respondent acknowledged that he was supposed to go to a driving school in Arizona for points on a license but failed to do so because he was in Michigan.

The respondent testified that he is unaware of any medical conditions for his wife and his child, that he himself suffers from a medical problem, indicating he needed a surgery for serious hemorrhoids and had had surgery for removal of the gall bladder. He testified that his wife's family were in the United States, she having been born in Chicago. He testified that while he may have relatives in Romania he is not aware of them since he has not returned since 1997. He testified that his father he believed had gone back for a period of time on his mother's death.

The respondent's wife testified that she was born in Chicago, Illinois meeting her husband when she was approximately 18. She testified that she has known him casually prior to that as he and his brothers used to come to play with her brothers. She testified they were married when she was 21 years of age and her son was born in 2001.

The witness testifies that they attend church in Taylor, attending church on Sundays and prayer meetings during the week.

The witness testified that she has not been employed since her marriage, however, she is currently doing some occasional cleaning jobs to earn money since she has no support from her husband. She testified she is receiving some support from her in-laws and has been unable to pay rent for some several months. She testifies that when she does have an occasional cleaning

job, her sister-in-law will assist her in providing care to her son.

The witness testified that she and her husband had talked about the possibility of deportation. She testified that she has no one there. Her family is all in the United States. She knows no one in Romania, although she has relatives on her father's side but does not know them.

STATEMENT OF THE LAW

Section 240A(a) of the Act provides for cancellation of removal by the Attorney General if the alien can establish he has been lawfully admitted for permanent residence for not less than five years and has resided in the United States continuously for at least seven years after having been in status. The alien must further show that he has not been convicted of an aggravated felony. Finally, the alien must show that the relief is merited in the exercise of discretion. Section 240A(a) of the Act.

The Board of Immigration Appeals has noted that in considering applications for relief under this section, the Court can consider the balance of the adverse factors evidencing the undesirability of the alien as a permanent resident against the social and humane consideration presented on the alien's behalf. *See Matter of C-V-T-*, Int. Dec. 3342 (BIA 1998); *Matter of Marin*, 69 I&N Dec. 581, 584-85 (BIA 1978).

The Board has found that factors applicable for the consideration of relief under former Section 212(c) of the Act are equally relevant in consideration of cancellation of removal under Section 240A(a) of the Act. *Matter of C-V-T-, supra.* These include family ties in the United States, duration of residence, particularly where the acceptance of residence occurred at a young age, evidence

of hardship to respondent and his family if deportation occurred, service in the military, history of employment, U.S. property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to respondent's good character. *Matter of Marin, supra.*

Equally applicable for consideration by the Court are adverse factors such as the nature and circumstances of the grounds of removal, the existence of additional significant violations of the Immigration laws, the existence of a criminal record, and if so, the nature, recency, and seriousness, as well as other evidence of the respondent's bad character or undesirability as a permanent resident of this country. *Matter of Marin, supra.* While existence of minimum equities may be sufficient in some cases to establish eligibility for the relief, as the negative factors grow greater and/or more serious, it becomes incumbent on the respondent to establish offering favorable equities. *Matter of Edwards*, 20 I&N Dec. 191 (BIA 1990); *Matter of Arrequin*, Int. Dec. 3247 (BIA 1995).

Where respondent has a criminal record he will ordinarily be expected to establish rehabilitation in order to merit this favorable exercise of discretion. *Matter of Buscemi*, 19 I&N Dec. 628 (BIA 1988). However, these applications must be evaluated on a case-by-case basis with rehabilitation as a factor to be considered in the exercise of discretion.

In this case the Government first of all disputes that the respondent is eligible statutorily for the relief of cancellation of removal. The Government argues that the respondent's alleged conviction in 1992 for attemp-

ted possession of cocaine in Florida stops the time from accruing for the necessary seven years of legal admission. *See* Exhibit No. 10. As discussed *infra*, the Court has found that there are serious questions as to whether or not this conviction in fact relates to this respondent. The Court has found that the charges of removal under this ground have been sustained as the Government has not met its burden by clear and convincing evidence of establishing that ground of removability. Moreover, the Court would note that given the physical discrepancies contained in the affidavit of the probable support which had been previously discussed that the Government has not established even by the standard of a preponderance of the evidence that this conviction relates to respondent. The respondent entered the United States in 1997 as a refugee, and in 1999 under Section 209 adjusted his status to that of a lawful permanent resident. Under the statute this relates back to the time of admission, and the respondent's first cognizable conviction occurred in 1995. Respondent, therefore, does have the requisite five years and seven years of legal residence in the United States so it is established statutory eligibility on this element.

The Government has also charged the respondent as having been convicted of an aggravated felony. This charge arises out of the conviction for attempted unlawfully driving away a motor vehicle and the subsequent sentence by the Court to 365 days. *See* Exhibit No. 6. As noted, first of all the respondent was initially sentenced to a probation violation. Nevertheless, the State of Michigan has ruled in *People v. Burks*, 22 Mich. at 253, 559 N.W. 2d 357, (Mich. App. 1996) that imposition of a sentence for violation of probation is considered the imposition of a sentence on the conviction in chief.

The respondent's sentence, however, was set aside by the sentence in Court in March of this year, and respondent was resentenced nunc pro tunc to a term of 273 days in jail. *See* Exhibit No. 9. The Court finds that the respondent by virtue of the resentencing in 2002 has not been convicted of an aggravated felony and therefore remains eligible to seek the relief of cancellation of removal.

The issue in this case is whether or not the respondent demonstrates that he warrants the exercise of the Court's discretion.

The respondent presents considerable equities. He is the father of a United States citizen child and is married to a United States citizen. The respondent's parents and siblings are permanent residents and/or citizens of the United States. He has resided in the United States for some nearly 20 years. He was ten years old at the time of his admission. The respondent has testified that he has some minor medical problems. While he states his parents have some medical problems, neither parent testified and there is no evidence of any medical problems from either of the parents. Respondent's spouse and child apparently have no medical issues. His wife has testified to the hardships that she has experienced during this year of separation as a result of the respondent's incarceration both for the imposition of sentence and the subsequent detention from November by the Department of Homeland Security. She has also indicated that she would suffer emotional hardship should the respondent be deported either by virtue of separation or by virtue of the fact that she would be separated from her family who all reside in the United States. The respondent states that he has been

employed in the United States and has submitted evidence of employment with a brother.

However, the respondent in this case has significant adverse factors. The respondent asserts that he has filed tax returns, but none have been presented in this case. The evidence of employment consists of a letter from a sibling who states that the respondent has been employed by him as a driver in his trucking company, indicating they have worked together since they were young. He also indicates in a subsequent employment letter that he would offer his brother a job were he to be released. He also states that he was employed by him for the past four years. The brother claims that he worked for a Browning Transportation during the time that the brother's business was slow, however, no evidence of this other than the brother's unsworn letter has been proffered for this employment. In his application the respondent lists only employment for the brother's company of GMC Transportation from January of 2000 to the present. Given the statements during testimony, the respondent was employed by a Liberty Tile in 1997 or 1998 at the time when he was stopped by the Sterling Height's [*sic*] police for a driving while license suspended, and the Court finds that there is considerable question as to a gallant record of employment that is being presented to this Court. The respondent has presented no evidence of ownership of property or a value or service of contributions to his community. The respondent has presented three letters from the church which indicate the respondent does attend. Further, the Court notes that the letters are strikingly similar, however, does acknowledge that both the respondent and his spouse did testify to their membership in this religious body. The respondent has submitted evidence of rela-

tives in the United States who are lawful permanent residents and citizens and has presented letters from parents and several siblings who describe him as an individual who is always willing to help and request that he be permitted to stay with his wife and child in the United States.

On the opposite consideration, the respondent has a rather significant criminal record which again when a juvenile record is indicated on the rap sheet in 1992.[2] The respondent's first adult conviction occurred in 1995 when he was convicted of receiving and concealing stolen property. Today before the Court the respondent seems to have been extremely dismissive of the events and his participation in events leading to his arrest and conviction. In the first case the respondent states that he was driving a van which had items in it and was arrested at a friend's place. The indictment information in this matter indicates that the van itself was the item that was stolen. *See* Exhibit No. 3. The second arrest for receiving and concealing stolen property the respondent claims that in a vehicle he was driving there were airbags that had been stolen. In each of these cases the respondent indicates that he was represented by Counsel but pled to the offenses because he was offered alternative lower sentences. The respondent before the Court cast them in the light as being events that were imposed upon him rather than events that he participated in. This is equally true of the unlawfully driving away of a motor vehicle charge in 1997. *See* Exhibit No. 6.

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[2] Court does not consider this as he has not been charged and is a juvenile proceeding. It is cited only to indicate the time at which the respondent began involvement in criminal activity.

The respondent has been somewhat less than candid with the Court concerning his convictions. On direct examination when asked about arrests and convictions, the respondent testified that he had the receiving and concealing, the two counts, the unlawfully driving away of a motor vehicle, the arrest for the attempt to pass a false title in Michigan, and the incident with the Detroit police shortly before the arrest by Oakland County in 2005. Respondent did indicate that he might have had one or two operating under the influence of liquor. However, in cross-examination when questioned by Government Counsel the respondent initially denied arrest for driving under the influence of drugs. He did admit to the use of drugs claiming that he used them only from the time he was 17 for approximately a year or a year and a half. The respondent then acknowledged that in 1997 he was charged with and convicted of operating a vehicle under the influence of drugs. The respondent's testimony with respect to his use of drugs, therefore, was at best inaccurate and at worse false. Respondent claimed to this Court that he had only used drugs for a year or a year and a half at the age of 17 which would have terminated at the approximate time the respondent was 18 and a half. The respondent was born in 1977 and at the time he was arrested and convicted of operating under the influence of drugs in Troy, Michigan he was 20 years of age. The respondent's testimony in other matters has been less than candid. On direct examination the respondent testified that he had not used any other names, yet on cross-examination respondent acknowledged that he had used the name of his brother Dorin, and also used the name and identification of his brother Ioan when encountering the authorities. The respondent was charged in 1997 for failure to appear in

Arizona arising out of obviously some sort of proceeding in that State for the violation of traffic laws to such an extent that a license was apparently at some jeopardy. Today the respondent testified that he has not only had a license suspended in the State of Michigan, but on at least two to three occasions has been cited and convicted or charged with driving while license suspended.

The respondent has failed to present any evidence of completion of probation in the second receiving and concealing or in the third offense for unlawfully driving away a motor vehicle. The reasons for failing to present proof of completion of probation in the UDAA are clear as the respondent was cited for violation of probation and then convicted of operating under the influence of alcohol in the city of Sterling Heights during the course of that probation. Consequently, this respondent was resentenced on the merits. *See* Exhibits No. 6 and 9.

The respondent today testified that since his marriage in 2000 he has led a spotless life. This, however, appears not to be true. The respondent was arrested by the Detroit police for violations of a city code and arrested by Oakland County and convicted of attempt to pass a fraudulent title, a crime involving moral turpitude. The respondent's conviction for this the respondent today alleges arises out of a misunderstanding of the licensure laws in the State of Michigan. The respondent claims that the vehicle was lawfully purchased in Arizona, lawfully titled in Arizona, and the issues in Michigan were simply a misunderstanding of requirements. Yet, the respondent has presented no evidence of this. It is for this offense as well as for the unlawful driving away a motor vehicle the respondent was in fact

incarcerated by the State of Michigan. *See* Exhibits No. 6 and 9.

The respondent in this case has a lengthy history of violations of both the criminal laws and the traffic laws of the United States. There is no doubt that he presents considerable equities, however, because of his criminal convictions the respondent is called upon to present significant equities to offset his criminal record. *See Matter of Buscemi, supra., Matter of Edwards, supra.* The respondent argues that he has been rehabilitated. Yet he has been incarcerated in 2005 and 2006, 2005 for the violation of probation. This is not evidence of rehabilitation. The respondent has not been candid in his testimony with this Court. At worst the respondent has presented false testimony to this Court relating to his drug use. The respondent comes to this Court seeking the exercise of the Court's discretion. During this critical proceeding it would be incumbent for the respondent to be forthright and honest with respect to his actions. The respondent has not been so. The facts in this case establish the criminal record. The respondent's testimony indicates that he has at least a history of drug use. The Court has no doubt that the respondent's family would be emotionally affected by the respondent's deportation. However, in balancing the equities in this case against the significant adverse factors, the respondent has not demonstrated that he merits the exercise of this Court's discretion. He has failed to demonstrate rehabilitation. He has been the subject of recent criminal activity which brought him to the attention of the Department of Homeland Security and ultimately to this Court. The respondent had the opportunity to establish his case and did present considerable equities. How-

ever, by his own actions he has shown that he does not merit the exercise of discretion of this Court.

Based upon the foregoing the following order will be entered.

ORDER

IT IS ORDERED that the respondent's application for cancellation of removal be, and hereby is, denied.

IT IS FURTHER ORDERED the respondent shall be removed and deported to Romania on the charges contained in the Notice to Appear.

ELIZABETH A. HACKER
Immigration Judge

May 3, 2006

APPENDIX B

[Seal Omitted]

U.S. Department of Justice

Executive Office of Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

MARCUS, Daniel P., Esquire
4000 Town Center, Suite 1060
Southfield, MI 48075

Office of the District Counsel/DET
333 Mt. Elliott St., Rm. 204
Detroit, MI 48207

Name: SFARCIOC, MARCEL **A27-772-726**

Date of this notice: 6/18/2007

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/ DONNA CARR
DONNA CARR
Chief Clerk

Enclosure

Panel Members:
OSUNA, JUAN P.

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

Date: [JUN 18, 2007]

File: A27 772 726 - Detroit, MI

In re: MARCEL SFARCIOC

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Daniel P. Marcus, Esquire[1]

ON BEHALF OF DHS:

Kathleen L. Alcorn
Chief Counsel

REISSUED DECISION

ORDER:

PER CURIAM. The Department of Homeland Security and the respondent, through counsel, have filed

[1] On May 24, 2007, the Board received a joint motion in which respondent's counsel Roger Rathi signed. However, he did not submit a Form EOIR-27 with the Board. On June 15, 2007, Daniel P. Marcus from the same law firm filed a Form EOIR-27 on the respondent's behalf.

a joint motion to reissue the Board's July 26, 2006, decision. The motion is granted and the July 26, 2006, decision is hereby vacated. An order in the matter is hereby issued as of this date, incorporating by reference the text of the attached vacated order.

/s/ ILLEGIBLE
FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

Date: [JUL 26, 2006]

File: A27 772 726 - Detroit

In re: MARCEL SFARCIOC

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Roger Rathi, Esq.

ON BEHALF OF DHS:

Rosario Shoudy
Assistant Chief Counsel

ORDER:

PER CURIAM. We adopt and affirm the decision of the Immigration Judge. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those which the Immigration Judge articulated in his or her decision"). On appeal the respondent contends that the Immigration Judge erred in denying his application for cancellation of removal under section 240A(a) of the Immigration and Nationality Act in the exercise of dis-

cretion. Specifically, he maintains that the sole negative factor in his case is his "minor criminal record" (Respondent's Br. at 5). However, we find no error in this regard. Contrary to the respondent's suggestion otherwise, the Immigration Judge thoroughly reviewed the respondent's positive equities, including his residence of long duration in the United States (which started at an early age), extensive family ties in this country (including a United States citizen wife and five-year-old son), evidence of hardship to the respondent and his family if removal occurs, a history of employment, evidence of value and service to the community, proof of genuine rehabilitation, and other evidence attesting to the respondent's good character. *See Matter of C-V-T*, 22 I&N Dec. 7 (BIA 1998); *see also Matter of Arrequin*, 21 I&N Dec. 38 (BIA 1995).

Nonetheless, as the Immigration Judge noted, the respondent's employment history is questionable as the sole evidence thereof, apart from the respondent's own claims, are unsworn letters from one of his brothers (I.J. at 19-20; Applic. tabs 8, 15). While the brother claims the respondent also worked for another trucking company on occasion, the respondent made no such claim, nor was any evidence in this regard produced. The respondent has not provided any tax returns, or evidence that he has ever filed the same, which might serve to corroborate his claims regarding employment (I.J. at 19).

As the Immigration Judge noted, the respondent's criminal history in the United States began in 1992 when he was a juvenile, with his first arrest as an adult occurring in September of 1995, for receiving and concealing stolen property in an amount over $100 (Tr. at 40-41;

Exh. 5; I.J. at 21). The respondent was also convicted of the same offense in October of 1997, as well as of attempted unlawful driving away of a motor vehicle in May of that same year. The respondent admitted to receiving two or three fines for driving while his licensed was suspended in 1994 or 1995 and 1997 or 1998 (Tr. at 47). In addition, he reported that he received tickets for driving under the influence of drugs and alcohol in 1997 and 1998, respectively (Tr. at 49). In April of 2004 the respondent was arrested for failing to appear (Tr. at 50-51). In May of 2005, he was convicted of a miscellaneous public order crime relating to his operation of a motor vehicle, then one day later he was arrested for, and ultimately convicted of, possession of a motor vehicle with intent to pass false title (Tr. at 51-52). The next month, June of 2005, the respondent was convicted of violating his probation for the latter offense, and was sentenced to imprisonment (Tr. at 52-53). He has since been detained.

The Immigration Judge appropriately noted the respondent's varying and rather self-serving explanations for his convictions, including his suggestion that one of his convictions for receiving and concealing stolen property related to an item in a vehicle, when in fact it was the vehicle itself that was stolen (I.J. at 21; Exh. 3; Tr. at 30, 44). The respondent also testified that he no longer has a drinking problem, that the same was in the past when he was growing up (Tr. at 62). However, this claim is at best questionable in light of the fact that the respondent's last probation violation was occasioned by his arrest for drinking and driving (Tr. at 53).

The respondent's long residence in this country from a young age and his extensive family ties here un-

doubtedly constitute strong equities. These equities, however, must be weighed against the negative factors in the respondent's case, specifically his criminal convictions, various arrests, and evidence of repeated disregard for the law. *See, e.g., Matter of Sotelo*, 23 I&N Dec. 201 (BIA 2001); *Matter of C-V-T-*, *supra*. Although the respondent argues on appeal that he cannot demonstrate evidence of rehabilitation since the time of his incarceration, that is not the sole issue presented. Rather, in his testimony the respondent sought to minimize his involvement regarding the various offences of which he stands convicted, often suggesting that he was a victim of circumstances, and/or that he plead [*sic*] guilty only in order to secure a lesser punishment (Tr. at 35, 42, 44, 50, 55, 57). The respondent's disregard for the laws of this country, and the administration of the same, started from an early age and, unfortunately, appeared to have reemerged after an apparent period of no arrests or convictions for several years.

Although none of the noted offenses in and of themselves is a severity to overcome the respondent's positive equities, they cumulatively constitute a significant adverse factor outweighing the equities in support of his application for cancellation of removal. As noted, the respondent's brushes with the law began at an early age, and have continued through his adulthood. We appreciate that a number of his interactions with law enforcement agencies occurred as a teenager and young adult. However, despite these encounters the respondent continued to drink and drive, not comply with lawful mandates, violate his probation, and commit further offenses. While we are not unsympathetic to the hardships presented to the respondent's various family members by the Immigration Judge's decision, given the

facts presented we find no error in her decision to deny the respondent relief in the exercise of discretion. *See Matter of Sotelo, supra; Matter of C-V-T-, supra.*

Accordingly, the appeal is dismissed.

/s/ ILLEGIBLE
FOR THE BOARD